these appeals are concerned. We hereby remit these cases back to the High Court for it to continue hearing the originating summons concerned. We would also like to repeat our expression of gratitude to all counsel for the assistance they have rendered to this court.

*Appeals allowed.*

Solicitors: *Skrine & Co; Yusof Abdullah & Partners; Shook Lin & Bok; Veloo & Co; MS Murthi & Partners.*

Reported by *Prof Ahmad Ibrahim*

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## Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22-435 OF 1990
MOHAMED DZAIDDIN J
11 DECEMBER 1990

*Civil Procedure — Injunction, ex parte — Setting aside — Whether can be set aside on ex parte application*

The defendants applied ex parte to set aside the ex parte injunction which was granted to the plaintiff. The issue before the court was whether in the exercise of its discretion, it should entertain the ex parte summons-in-chambers.

**Held,** dismissing the defendants' application:

(1) The court can dissolve an ex parte injunction made on an ex parte application provided a case of sufficient cogency can be made out and the plaintiffs are informed of the application.

(2) From the facts, the plaintiff was not informed of the application, and this is fatal to the defendants' application. However compelling the reason was for the ex parte order to be dissolved immediately, the fact that the plaintiff or his solicitors were not informed of the application has persuaded the court not to grant the order.

**[Bahasa Malaysia summary**

Defendan-defendan memohon ex parte untuk mengenepikan injunksi ex parte yang diberi kepada plaintif. Isu di hadapan mahkamah ialah sama ada dalam penggunaan budibicaranya, ia patut mendengar saman dalam kamar ex parte itu.

**Diputuskan,** menolak permohonan defendan:

(1) Mahkamah boleh membubarkan injunksi ex parte yang dibuat atas permohonan ex parte dengan syarat bahawa satu kes yang cukup kuat boleh dikemukakan dan plaintif-plaintif diberitahu tentang permohonan tersebut.

(2) Daripada fakta-fakta, plaintif tidak diberitahu akan permohonan ini dan ini amat memudaratkan permohonan defendan-defendan. Betapa memaksa pun alasannya bagi perintah ex parte dibubarkan dengan serta-merta, fakta bahawa plaintif atau peguamcaranya tidak diberitahu tentang permohonan ini telah mempengaruhi mahkamah supaya tidak memberi perintah itu.]

**Cases referred to**

1 *Subramaniam Lakshamanasamy* v *Datuk S Samy Vellu & Ors* [1988] 1 MLJ 42 (distd)

2 *Castle Fitness Consultancy Pte Ltd* v *Manz* [1990] 1 MLJ 141 (distd)

3 *London City Agency (JCD) Ltd & Anor* v *Lee & Ors* [1970] Ch 597 (refd)

*RJ Manecksha* for the first defendant.

*K Balasundaram (Edmund Gnanamuthu* with him) for the second, third, sixth and seventh defendants.

*Cur Adv Vult*

**Mohamed Dzaiddin J**: This is the defendants' application, made ex parte, to set aside the ex parte injunction which I granted to the plaintiff on 3 December 1990.

The preliminary issue to be decided today is whether, in the exercise of my discretion, I should entertain this ex parte summons-in-chambers. Yesterday, I heard full submissions of counsel with respect to this ex parte application. Encik Balasundaram, for the defendants, submitted that due to the urgency of the matter, as explained by the third defendant in his supporting affidavit (lampiran 9), this court can hear the defendants' application ex parte. Counsel relied on my decision in *Subramaniam Lakshamanasamy* v *Datuk S Samy Vellu & Ors*[1] and the Singapore High Court decision in *Castle Fitness Consultancy Pte Ltd* v *Manz*[2] for the proposition that an interim injunction can be dissolved ex parte. Be it noted that in both cases we followed the decision of Megarry J in *London City Agency (JCD) Ltd & Anor* v *Lee & Ors*.[3]

The facts of the present application are these. On the morning of 6 December 1990, the defendants' solicitors, Messrs Balasundaram & Co, filed in the registry an ex parte summons-in-chambers together with an affidavit, memorandum of appearance and 'perakuan segera'.

The entire file was then passed to me by my registrar for further direction. I was informed by my interpreter that counsel was outside my chambers in case I wanted to hear the application on the same day. However, after perusing the relevant documents I minuted on the file that it be heard on 10 December 1990 at 2.30pm. I had then in mind for the matter to be heard inter partes and it would be suitable for the plaintiff's counsel to travel to Penang on the morning of 10 December 1990. However, at the outset of the hearing yesterday, I was told by my interpreter that the matter would be heard ex parte. Throughout his submission, Encik Balasundaram did not indicate to me if he or his firm had informed the plaintiff's solicitors about the ex parte hearing. Thus, in the absence of any explanation by counsel, I formed the impression that the plaintiff's solicitors were unaware of the present application.

Now, on the law, the court can dissolve an ex parte injunction made on an ex parte application provided:

(a) a case of sufficient cogency can be made out; and
(b) the plaintiffs are informed of the application.

(See 22 *Atkin's Court Forms* (2nd Ed) (1986 re issue) at p 84.)

In *London City Agency* v *Lee*,[3] Meggary J held that the court has ample jurisdiction to make such an order in a proper case.

Based on Encik Balasundaram's submission and after reading the affidavit of the third defendant, I accept the defendant's reasons for filing the application ex parte and in my view a case of sufficient cogency was made out. However, from the facts, I am satisfied that the plaintiff was not informed of the application. In my view, this is fatal to the defendants' application. It will be noted in both cases of *Subramaniam*[1] and *Castle Fitness*[2] that the plaintiffs were aware of the application. In *Subramaniam*'s case,[1] counsel for the plaintiff was aware that the defendants' counsel were in the corridor of my court armed with an ex parte summons. Despite the absence of the plaintiff's counsel before me, I heard the application ex parte because it was an urgent matter. In *Castle Fitness*'s case,[2] it appears that the plaintiffs were not before the judge although their solicitors had advance knowledge of the ex parte application.

Therefore, in the circumstances of this application, I find that it is not proper for me to dissolve the ex parte injunction short of hearing the plaintiff or his solicitors. In my view, however compelling the reason was for the ex parte order to be dissolved immediately, the fact that the plaintiff or his solicitors were not informed of the application has persuaded me not to grant the order. In the result, I direct that this application be now heard inter partes and the necessary papers be served on the plaintiff or his solicitors. The registrar shall give a suitable date as soon as practicable.

*Application dismissed.*

Solicitors: *Ong & Manecksha; Balasundaram & Co.*

Reported by *Zarinah Marican*

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# Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S7-23-436-1988
LIM BENG CHOON J
23 MARCH 1990

*Contract — Performance bank guarantee — Whether plaintiff required to prove contractor's default before bank's liability arises — Whether defendant bank is bound absolutely by the terms of the guarantee to pay the plaintiff on demand — Contracts Act 1950, s 81*

This is an appeal by the defendant against the decision of the senior assistant registrar granting the plaintiff leave to enter final judgment of the sum of $179,384.58 together with interest and costs pursuant to O 14 of the Rules of the High Court 1980.

The cause of action of the plaintiff was grounded on the alleged breach of a bank guarantee whereby the defendant agreed to guarantee, in the sum of $179,384.58, the due performance of the contract ('the building contract') entered into between Sarikon Sdn Bhd ('Sarikon') and the plaintiff by which the contractor undertook to complete certain construction works for the sum of $3,587,691.65.

The plaintiff alleged, inter alia, that on 15 December 1987 the receivers and managers of Sarikon informed the plaintiff by telex of their intention to terminate all works under the building contract with effect from 18 December 1987 and Sarikon did on that date abandon the works on site. It was therefore asserted that by reason of the abandonment of works the plaintiff properly terminated the contract and called upon the defendants to honour the bank guarantee. The defendant, however, refused to honour the bank guarantee notwithstanding that the bank guarantee, according to the plaintiff, stood on the same footing as a letter of credit and the defendant, as a bank, was bound to honour the same upon its terms. The plaintiff therefore claimed that the defendants could not have any defence to their action and that the defendant was truly indebted to them for the sum stated in their statement of claim.

**Held,** dismissing the defendant's appeal:

(1) Section 81 of the Contracts Act 1950 reduces the efficacy of the provision that the liability of the surety is co-extensive with that of the principal debtor in cases where a surety has executed an agreement of guarantee or indemnity with the person indemnified indicating that the surety would pay subject only to the terms of the said agreement. In this respect, the English common law rule of disregarding whether the surety's obligation is absolute or conditional cannot apply.

(2) By the conditions of the guarantee, the defendant is bound to indemnify the plaintiff should Sarikon fail to execute the contract or commit any breach of their obligations thereunder unless relieved from the performance by any clause of the contract or by statute or by decision of a tribunal of competent jurisdiction. When Sarikon failed to execute the contract, that is, when they failed 'to complete and carry into effect' the works and they were not excused by any term in the contract or by the decision of a tribunal made before the demand for indemnity by the plaintiff to the defendant under the terms of the bank guarantee, then the defendant is bound to pay on demand.